No. 624

In the Supreme Court of the United States

OCTOBER TERM, 1968

CLYDE A. PERKINS, *Petitioner*

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Rehearing

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Most respectfully, respondent prays for a rehearing of that portion of the Court's opinion which orders a remand, with directions to enter judgment for petitioner.

REASONS FOR GRANTING A REHEARING

On June 16, 1969, this Court reversed the Court of Appeals on the principal question decided below—namely, whether a fourth line price discrimination is proscribed by section 2(a) of the Clayton Act. We accept the ruling of this Court on this question of law, which was the basis of the petition for certiorari, and which was argued before the Court. We submit, however, for the reasons hereinafter set

forth that the case should be remanded to the Court of Appeals.

We begin with the last paragraph of the Court's opinion:

> "Respondent has argued in its brief several minor trial rulings which it contends were in error. Most of these additional arguments were rejected by the Court of Appeals. We have examined the others and find them without merit. We therefore see no need to prolong this litigation which began nearly 10 years ago. The jury's verdict and judgment should be reinstated. *It is so ordered.*"

We agree with the Court that this case has been pending entirely too long. But, in fairness, that is not our fault. We are not to blame for the 2½ years during which the Court of Appeals held the case under consideration. Nor are we chargeable with the fact that the case had to be tried twice, because petitioner's counsel induced a mistrial by his misconduct before the jury.

In the Court of Appeals respondent urged numerous prejudicial errors. On some of these the court below sustained respondent's contentions. In view of its ruling on the narrow issue of law the court below said that it would not pass upon other errors, stating its confidence that they would not occur on a retrial:

> "Other assignments urged by Standard in its brief involve matters not likely to occur during the course of another trial and we therefore, in order to avoid unduly prolonging this opinion, do not discuss them. Our failure to do so, however, is not to be taken as an appellate approval of every ruling not specifically discussed herein" (A. 117).

These assignments were proper grist for decision in the lower appellate courts. They were not matters of far-reaching significance in terms of this Court's function of

review, but were of vital importance to the parties, and to the integrity of the verdict.

Some of these additional issues we did not raise here. Others were summarily adverted to in the briefs, without the benefit of oral argument. This was out of respect for the familiar rules applicable to the scope of this Court's appellate review, in light of the narrow ruling by the Court of Appeals. Yet these issues require plenary consideration if justice is to be done.

For brevity's sake, we refer to but a few of the errors in the trial of this case, each of which requires a new trial.

(1) The Meeting of Competition Defense.

There was substantial evidence that respondent reduced its price to Signal Oil and Gas in order to meet the lower prices of Union Oil, a competitor. An officer of respondent testified that he was informed by Signal of a better offer from Union, and that as a result lower prices were given Signal to retain its business (A. 428, 432-433; A. 651).

Under this Court's decision in *Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, 759-760, it was not necessary for respondent to show that a lower offer had in fact been made—but only that it was reasonable to believe so, under the circumstances. This was a question for the jury.

The trial court, at the outset, properly outlined for the jury respondent's contention:

> "In connection with this claimed defense, Standard contends * * * such lower price was extended by Standard in good faith and in the reasonable belief that it was thereby meeting the equally low or still lower price offered Signal Oil and Gas Company by one or more of Standard's competitors" (A. 63).

But it then went on to destroy this defense by the erroneous instruction that:

> "Before the defense of good faith meeting of competition may be used by the defendant under the provisions of the law, *there must have been a definite offer which was extended by a competitor of defendant Standard to a customer of defendant and defendant must have been aware of such offer* • • •" (emphasis added) (A. 64).

Further, the trial court refused to permit respondent to introduce records from Union's files that would have shown actual offers of lower prices to Signal. Such records, although dated after Standard's price reduction, would have corroborated the good faith belief of Standard that lower prices were being offered.

The Court of Appeals held both the exclusion of the evidence and the conflicting instructions to be prejudicial errors (A. 116-117). No other conclusion is possible. Petitioner's argument to the jury relied on the erroneous instruction, emphasized it, and urged the jury to find for petitioner even though respondent reduced its prices—as the uncontradicted evidence indisputably established—in good faith and in the reasonable belief that it was meeting the equally low or lower price offered to Signal by Union. Petitioner argued to the jury:

> "I think you will find from the Judge's instructions that the requirements are quite strict. It cannot be just something in mid-air. It has to be normally an individualized situation. *It has to be an actual offer being extended in that particular time*" (emphasis added) (Tr. 6194).

and also:

> "They must show you that *they were in fact meeting a bonafide competitive offer extended to Signal Oil and Gas as a justification* • • •" (emphasis added) (Tr. 6188).

The erroneous instruction and exclusion of evidence went to the very heart of the defense, utterly depriving respondent of the single, most important and complete defense under the Robinson-Patman Act. A verdict so arrived at simply should not, in justice, stand.[1]

(2) The Damage Computations.

(a) *Retail promotional allowances.* Petitioner was a wholesaler except for the operation of *one station* in Vancouver (A. 487). Nevertheless, the trial court permitted the jury to compute damages for claimed violations of sections 2(d) and 2(e), applicable only to promotional allowances at the retail level, on *all* of petitioner's gallonage. The court instructed (A. 65-67):

> "In determining the amount of damage • • • you may consider • • • [t]he so-called restroom and maintenance allowances and the furnishing of credit card services.
>
> • • • • • • •
>
> "Also, any services or facilities furnished or agreed to be furnished by defendant Standard to Chevron or Signal dealers which were not accorded to plaintiff Clyde Perkins and the two Perkins corporations, or either of them, upon proportionately equal terms in accordance with these instructions."

Petitioner urged the jury to multiply the entire gallonage handled by his wholesale business as well as by his one retail station, by the estimated value of each of the benefits provided to respondent's retailers. For example, he argued:

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1. The error, of course, was not cured by the court's giving a contradictory and correct instruction (*Bollenbach v. United States* (1946) 326 U.S. 607, 611-612; *Pacific Greyhound Lines v. Zane* (9 Cir. 1947) 160 F.2d 731). This is especially true here where the jury was repeatedly urged by counsel to rely on the erroneous instruction (Tr. 6188, 6194).

"I think that one of the witnesses said it was approximately at one and three quarters cents value of their credit cards. If you multiply out our gallonage of claimed loss for that, you would come out with figures, I feel, a good deal higher than these that [the accountant] Mr. McDaniel has come up with. He has not included that type of figuring, because I believe the Court has advised that the jury is perfectly capable of doing its own sort of mathematics on its own power where you have credit card allowances and the testimony of one and three quarters cents per gallon, and you know our gallonage" (Tr. 6324).

Thus the jury was permitted and urged to multiply the promotional allowance, legally applicable only to petitioner's one retail station[2] by his entire 19,000,000 gallon purchases, virtually all of which were for his wholesale business. This was clear and prejudicial error unless, of course, this Court intends to overrule its holding in *FTC v. Fred Meyer, Inc.* (1968) 390 U.S. 341.

(b) *Schedule of damages.* On the asserted 2(a) price discrimination issue the trial court permitted petitioner to present to the jury a schedule which computed damages on the basis of a price differential in favor of Signal during a 16-month period on sales to petitioner in Portland which was only one of petitioner's 32 markets. The schedule computed damages by multiplying the 19 million gallons of gasoline sold to Perkins throughout his whole marketing territory during the entire two and one-half year claim period by the price differential which existed for about half the relevant period and in only the single market.

This faulty schedule went to the jury, with the instruction that, "The amount of price differential on gasoline" may be

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2. *FTC v. Fred Meyer, Inc.* (1968) 390 U.S. 341. And see opinion of the Court of Appeals on rehearing, A. 103-104.

considered by the jury in "determining the amount of damage * * * suffered" by Perkins (A. 65-66). No distinction was made between the limited amount of gallonage delivered in Portland on which there was a price differential and the millions of gallons delivered elsewhere.

The error was demonstrably prejudicial. Petitioner urged the jury to apply the Portland differential to his entire gallonage:

> "* * * the fact is that when we talk about a tenth of a cent in this business, it is important, it is really important because of the quantities that were being purchased because when we project that over the sales that were being made by Clyde Perkins * * * around 19 million gallons * * * those quantities can be very substantial * * *" (A. 451).

(c) *Price war assistance.* The jury was allowed to compute damages for the entire claim period in an amount equal to the price war allowances to respondent's branded dealers. Yet (except for five dealers on one brand of gasoline for one week in Centralia, Washington) in no instance did these price allowances reduce the price to branded dealers below the price paid by Perkins.[3] The trial court permitted the jury to award damages on account of this price war assistance even though the resulting net price to the retail dealers was higher than the price to Perkins. The trial court so erred because it improperly considered the price war assistance as a payment for a service within the mean-

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3. The statements of this Court that "Standard charged Perkins a higher price for its gasoline and oil than Standard charged to its own Branded Dealers" (slip opinion, p. 2), and that "Standard has admitted that it sold gasoline and oil to its Branded Dealers * * * at discriminatorily lower prices than those at which it sold to Perkins" (slip opinion, pp. 2-3) are inaccurate. There was no such concession, and the record is undisputed that except for the inconsequential occurrence mentioned in the text, the price to Perkins was *always* lower than the price to Standard's Branded Dealers.

ing of section 2(d). It instructed the jury that it could measure damages by:

> "Any payments, subsidies, or allowances * * * which were not available on preportionately equal terms to plaintiff Clyde Perkins or either of the two Perkins corporations or any of them in accordance with these instructions" (A. 66).

Again this error is demonstrably prejudicial. Petitioner argued to the jury:

> "Now if you consider the nineteen million plus gallons that were sold to Mr. Perkins, if he had received the same subsidy, he would have received an additional $190,000 * * *" (Tr. 6154).

(d) *The 10 per cent sales increase factor.* The trial court permitted the jury to consider a damage item of $168,251 based upon assumed increase in petitioner's business of 10 per cent per year (Exhibit 82-E, A. 531; 82-F, A. 533). The only basis in the record for this assumption was a provision in petitioner's contract with respondent limiting respondent's obligation to supply additional gasoline to petitioner during the contract period to 10 per cent per year. Petitioner argued to the jury:

> "* * * on the basis of what the business had done and on the basis of the contract formula, this 10% factor, that there would be an additional gallonage that would have been sold, and the average profit margin which would have been another $168,251" (Tr. 6152).

As the court of appeals noted, there is no foundation whatsoever in the record for submitting this calculation to the jury (A. 115).

(3) Expert Testimony.

Dr. Vernon Mund, Professor of Economics at the University of Washington, was called as an expert by petitioner. He was permitted to testify:

> "On the basis of my studies and my examination of complaints filed with the Federal Trade Commission of the Department of Justice, I came to the conclusion that there is no genuinely free and open market in the sale of gasoline in particular at the primary and secondary wholesale levels, because the evidence indicates that anyone really isn't free to go and buy what he wants on the same terms and conditions available to anybody else or available to other people who are, in fact, buying. The proof of that statement is simply the fact that all these people complained that they couldn't buy. The evidence that they conldn't buy" (Tr. 2501).

He said he reached this conclusion on the basis of facts given him for study by government agencies in a "confidential way" on the condition that he was "never to reveal" the original sources (Tr. 2498-2499). The prejudice caused by this statement needs no elaboration. None of the "confidential" facts were in evidence or available to respondent for cross examination. To admit the opinion of a witness based on undisclosed facts or sources of fact is contrary to the most elementary standards of fair play, and is plain legal error. In *Raub v. Carpenter* (1902) 187 U.S. 159, this Court held (p. 161):

> "Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence."

Of equal importance, when respondent attempted to test the abstract opinions of Dr. Mund against the actual economic conditions in the Pacific Northwest, respondent was prohibited from doing so, on the remarkable ground that

such cross examination was beyond the scope of the direct (A. 360). Thus the expert called by the petitioner was permitted to create an atmosphere of general prejudice and was protected against the requirement that he specify facts relevant to the lawsuit that would support his assertions.

CONCLUSION

In the circumstances, respondent urges that this Court modify its opinion and, consistent with its usual practice, remand the case to the Court of Appeals for further proceedings in conformity with the Court's opinion. If the additional rulings of the Court of Appeals were made, as this Court apparently thought, only for the guidance of the trial court at a new trial, then, of course, the Court of Appeals will be free to order reinstatement of the jury's verdict. A remand, however, will give respondent an opportunity to be heard on the above—and other—issues, in the light of this Court's ruling on the section 2(a) question. More importantly, it will provide for a just result as between the parties.

Respectfully submitted,

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July, 1969

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that he is a member in good standing of the bar of this Court, that he has prepared the foregoing petition for rehearing and is familiar with its contents, and that respondent is presenting such petition in good faith, and not for delay.

Dated this 7th day of July, 1969, at San Francisco, California.

/s/ RICHARD J. MACLAURY
RICHARD J. MACLAURY
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